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SUPREME COURT OF THE UNITED STATES

CLERK

OCTOBER TERM, 1940

No. 832

STATE OF OKLAHOMA, *ex Rel.* LEON C. PHILLIPS,
GOVERNOR OF THE STATE OF OKLAHOMA,

Appellant,

vs.

GUY F. ATKINSON COMPANY, CLEON A. SUMMERS,
UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF
OKLAHOMA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF OKLAHOMA.

STATEMENT AS TO JURISDICTION.

MAC Q. WILLIAMSON,
Attorney General of Oklahoma;

RANDALL S. COBB,
First Assistant Attorney General;

C. C. HATCHETT,

WM. O. COB,

Counsel for Appellant.

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OCTOBER TERM, 1940

No. 832

STATE OF OKLAHOMA, ex REL. LEON C. PHILLIPS,
GOVERNOR OF THE STATE OF OKLAHOMA,

Appellant,

vs.

**GUY F. ATKINSON COMPANY, A CORPORATION UNDER
THE LAWS OF THE STATE OF NEVADA, CLEON A. SUM-
MERS, UNITED STATES DISTRICT ATTORNEY FOR THE
EASTERN DISTRICT OF OKLAHOMA, AND CURTIS P. HAR-
RIS, SPECIAL ATTORNEY, DEPARTMENT OF JUSTICE OF THE
UNITED STATES,**

Appellees.

**STATEMENT OF BASIS ON WHICH APPELLANT
CONTENDS THE SUPREME COURT OF THE
UNITED STATES HAS JURISDICTION TO REVIEW
ON APPEAL THE ORDER, JUDGMENT AND DE-
CREE DISMISSING THE COMPLAINT AND DENY-
ING THE INJUNCTION, AS REQUIRED BY RULE
12 OF THE SUPREME COURT OF THE UNITED
STATES.**

Preliminary Statement.

It is deemed advisable to make a preliminary or intro-
ductory statement of fact preceding the principal juris-
dictional statement hereof, so that the Court may better
understand the nature of the case.

This is a case or controversy of a civil nature between the appellant, The State of Oklahoma, and the appellees, Guy F. Atkinson Company, a corporation, the building contractor commencing construction of the project in question, and Cleon A. Summers, United States District Attorney for the Eastern District of Oklahoma, and Curtis P. Harris, Special Attorney, Department of Justice of the United States, who are instituting proceedings to condemn lands for the purposes of said project. The controversy arises out of and directly involves the validity of an Act of Congress of the United States, passed and approved on June 28, 1938, being H. R. 10618 (Public No. 761, 75th Congress, Chapter 795, 3rd Session), 52 Stat. 1215, Styled:

“An Act authorizing the construction of certain public works on rivers and harbors for flood control and for other purposes”

more specifically that portion of said Act of Congress entitled,

“The Denison Reservoir on Red River in Texas and Oklahoma for flood control and other purposes as described in House Document Numbered 541, Seventy-fifth Congress, third session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable, is adopted and authorized at an estimated cost of \$54,000.00: PROVIDED, That in the consideration of benefits in connection with the Denison Reservoir all benefits that can be assigned to the proposed Altus Project and other such projects in Oklahoma shall be reserved for said projects.”

The complaint and the record shows that:

- o The Denison Reservoir on Red River in Texas and Oklahoma, authorized by said Act, is being constructed by appellees at a point about four miles northwest of Denison,

Texas, and approximately sixteen miles southwest of Durant, Oklahoma, by the erection of a huge earthen dam some four or five miles in length across Red River. The greater portion of said dam will be and rest upon Oklahoma soil, and will form a huge reservoir which will inundate approximately 100,000 acres of Oklahoma land. Said dam will impound the waters of Red River in Oklahoma, and of the Washita River, a tributary of said Red River, which lies wholly within the State of Oklahoma. Red River flows in a south easterly direction. The cut bank along the southerly side of the sand bed constitutes the south bank of Red River, and the southern boundary of Oklahoma is on and along the south bank of Red River at the mean level of the water when it washes the bank without overflowing it (260 U. S. 633). No part of Red River within the State of Oklahoma is a navigable water of the United States (*State of Oklahoma, complainant, State of Texas, defendant, United States, intervener*, 258 U. S. 574, No. 20 Original, decided May 1, 1922). Red River has remained non-navigable and is not now a navigable water of the United States. Likewise, Red River as it passes through the State of Oklahoma is entirely an Oklahoma Stream (260 U. S. 606, No. 18 Original, decided January 15, 1923).

Approximately 3800 acres of the land which is to be inundated by the waters of said reservoir and is about to be condemned by the appellees, Cleon A. Summers and Curtis P. Harris, is owned by the State of Oklahoma as fast lands in its capacity as a sovereign State. Said reservoir will destroy many miles of highways and right-of-way therefor, and many bridges, all devoted to the public use and all owned by appellant as a sovereign State. Said highways and bridges about to be destroyed are strategically located and form vital and connecting links in the intricate system of state highways owned by appellant. Much of the

counties of Love, Marshall, Johnson and Bryan of the State of Oklahoma will be taken and many school districts completely destroyed or crippled. The approximately 100,000 acres of land located within the State of Oklahoma which will be inundated by the reservoir are principally agricultural lands now inhabited by approximately two thousand families or a total of approximately eight thousand people, citizens and residents of appellant. Much of said land is rich soil in a high state of cultivation and is used by the inhabitants thereof as homes and as a means of livelihood.

Much of said land to be inundated has large potential oil reserves and on some land there is now located many oil wells, and extensive drilling activities are going on in the area at this time. It is now practically certain that approximately 15,000 acres of said lands to be inundated by the reservoir will be, when developed, highly productive of oil and gas. Appellant derives much of its revenue used for the support of its government, including its university, colleges and eleemosynary institutions from a tax levied upon the gross production of oil and gas. The taking of said lands will cause appellant great loss in its taxable revenues and will seriously hamper appellant in the execution of its governmental functions as one of the States of the American Union.

The annual wealth production from agricultural products alone accruing to the citizens of appellant State from the lands which will be inundated is the sum of approximately \$1,500,000.00.

Approximately fifty miles of the southern boundary of appellant State is to be inundated, obliterated, and for all practical purposes destroyed.

As provided in said House Document 541, the waters of Red River and the Washita River are to be impounded by and above said dam creating said huge reservoir, and then

diverted out of the dominion of the State of Oklahoma and into the State of Texas and there run through conduits and turbines located entirely within the State of Texas for the generation of hydroelectric power for the principal benefit of the area located around Dallas and Fort Worth, Texas. The said waters of Red River and the Washita River to be impounded and diverted as aforesaid, belong to appellant. The taking thereof and the building of the said reservoir project is without the consent of appellant, State of Oklahoma, and against its objections and protests and without compensation to it.

The declared purposes of Congress in the building of said reservoir as shown by the Act itself, and by an examination of said House Document 541, 75th Congress, 3rd Session, same being an engineers report, is for flood control and the development of hydroelectric power and the two purposes are combined together in the one statutory enactment. Appellant alleged in the complaint in numerical Paragraph 6 thereof, that subsequent to the passage and approval of the Act of Congress aforesaid (H. R. 10618, 75th Congress, 3rd Session), the statutory scheme has been changed by the Secretary of War and Chief of Engineers from a plan preponderantly for flood control to a plan preponderantly for the development of water power.

The appellee, Guy F. Atkinson Company, a corporation, purporting to act under contract with the Secretary of War, or the Board of Army Engineers, or the Chief of Army Engineers, has now located on the Oklahoma side of the proposed dam a great number of machines consisting of trucks, tractors, steam shovels, rig lines and other equipment for the removal of earth, rock and gravel and is now engaged in the construction of the dam across Red River at the proposed location aforesaid. The said appellee, Guy F. Atkinson Company relies solely and exclusively

for the validity of its said contract its acts in the construction of said project as aforesaid, on the Act of Congress hereinabove mentioned and set forth, to-wit, H. R. 10618, 75th Congress, 3rd Session, 52 Stat. 1215.

The appellee, Cleon A. Summers, United States District Attorney for the Eastern District of Oklahoma, and the appellee, Curtis P. Harris, Assistant to the Department of Justice of the United States of America, relying exclusively upon said act of Congress, have instituted numerous condemnation suits in the courts for the purpose of acquiring the title to various tracts of land within the proposed reservoir, and for the purpose of the proposed reservoir, and said appellees now propose and intend to institute additional condemnation suits for the purpose of acquiring additional lands therefor, all of which lands are located within the domain of appellant State.

At no time has appellant given its consent to the acts and proposed acts of said appellees, or any of them, but on the contrary, has at all times protested and made numerous protests in writing to the Secretary of War, having charge of the construction of said dam and reservoir, of which protests and objections said appellees have had and do now have actual notice.

The taking said lands off the *ad valorem* tax rolls, will alone cause a net taxable loss to subdivisions of government of the State of Oklahoma in the sum of approximately \$40,000.00 per year.

Appellant alleges in the complaint that the Act of Congress aforesaid, authorizing construction of said Denison Reservoir is not for a public purpose and is unconstitutional and void and beyond the power of the United States, and that the construction of said reservoir is in violation of the rights of appellant reserved to it by the Tenth Amendment to the Constitution of the United States, and that

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the acts and threatened acts of the appellees as aforesaid constitute a direct invasion and destruction of its sovereign, quasi sovereign, territorial boundary and proprietary rights in that,

(1) Appellant will be compelled to surrender its jurisdiction of and over the territory inundated, and,

(2) Appellant will be deprived of its established boundary line for a distance of approximately fifty miles, and,

(3) Appellant will be deprived of many thousand acres of its best lands, which will be in effect, a forceable reduction of the area of appellant as one of the States of the American Union, and,

(4) Appellant will be deprived of its ownership in fee simple of approximately 3800 acres of land which it owns and holds for the benefit of its schools and institutions, and,

(5) Appellant's highways and rights-of-ways therefor, and bridges will be destroyed and its integrated system of communication and travel over said highways and bridges will be interrupted and destroyed, and,

(6) The waters of the Washita River and Red River owned by appellant will be taken from it in violation of its laws without payment, or offer of any payment or compensation for the taking thereof, and said waters will be diverted into another State without benefit to appellant, and there used and appropriated for the purpose of generating hydroelectric power to be sold on the available market without compensation to appellant, notwithstanding said waters belong to appellant, and,

(7) Said project will oust appellant's citizens from approximately 100,000 acres of agricultural lands and will

thereby create a serious social and economic problem to appellant, the burden of which will fall heavily upon the appellant, and there is no compensation, nor measure of compensation offered or afforded appellant, and,

(8) Said project will destroy more than thirty of appellants subdivisions of government, or so cripple the same by loss of taxable revenues as to make it impossible for such subdivision to function.

Appellant instituted this action by complaint filed in the United States District Court for the Eastern District of Oklahoma within which judicial district the said dam and reservoir are located. Appellant contended by said complaint and now contends that the appellees are without lawful power or authority to institute the proceedings for the condemnation of said lands or to construct said project; that the Act of Congress, as same is being applied, and as the same is sought to be applied and enforced by the appellees and under which they are acting in the premises aforesaid, and upon which they exclusively and solely rely is beyond the power of Congress to enact, and is repugnant to the Constitution of the United States, and is void, and that the same contravenes the rights and powers of appellant, reserved to it by the Tenth Amendment to the Constitution of the United States; that said project and scheme as outlined and set forth in said Act and in House Document 541, as aforesaid, are not for public purposes and are not within the power of Congress, expressed or implied, conferred by the Constitution of the United States by Section 8, Article 1, on any other provision thereof; that said acts and threatened acts of said appellees constitute an unlawful invasion and destruction of the sovereign, quasi sovereign, territorial, and proprietary rights of appellant, reserved

to it and protected by the Tenth Amendment of the Constitution of the United States, and inherent in our dual system of government." That said appellees are acting and threatening to act in excess of legal or constitutional authority, and unless enjoined and restrained they will commit and perform said illegal and void acts and invasions, to the irreparable injury of appellant, for which it has no complete, adequate, nor speedy remedy at law.

After the complaint was duly filed in the United States District Court for the Eastern District of Oklahoma, a three judge court was duly constituted, as provided by Section 380(a), Title 28 U. S. C. A. (50 Stat. 752, act approved August 24, 1937, Chapter 754, Section 3). Thereafter, the appellees duly filed in said cause their motion to dismiss the complaint. Said motion to dismiss was duly set for hearing and heard by said specially constituted three judge court, and thereafter the said motion to dismiss was by said court sustained with exception to appellant. The memorandum opinion of said court sustaining the contentions of appellees and sustaining the said motion to dismiss found and determined that said complaint failed to state a claim against appellees upon which relief could be granted, because the said Act of Congress, as the same being applied and sought to be applied by said appellees, was valid, legal and constitutional and was in nowise repugnant to the Constitution of the United States, and in nowise in violation of rights reserved to appellant by the Tenth Amendment to the Constitution of the United States.

Appellant thereupon elected to stand on the complaint and amendment thereto, and the record, and said Court thereupon made and entered its order, judgment and decree denying the injunction prayed for.

This appeal is taken from the order and judgment of said Court dismissing said complaint and denying the injunction prayed for.

Jurisdictional Statement.

Pursuant to Supreme Court Rule 12, appellant makes this statement particularly disclosing the basis on which it contends that the Supreme Court of the United States has appellate jurisdiction to review on appeal the order, judgment and decree appealed from, and says:

I.

The statutory provision believed to sustain jurisdiction of this appeal by the Supreme Court of the United States is, Section 3, Chapter 754, Act of Congress of August 24, 1937, Title 28, Section 380(a), U. S. Code (50 Stat. 752), and particularly the following provisions thereof:

"An appeal may be taken directly to the Supreme Court of the United States upon application therefor, or notice thereof, within thirty (30) days after the entry of the order, decree, or judgment granting or denying, after notice and hearing, an interlocutory or permanent injunction in such case.

"Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible time and shall take precedence over all other matters not of a like character."

II.

The United States statute, the enforcement, operation and execution of which, by appellees, is sought to be enjoined by appellant, is:

"An Act of Congress of the United States passed and approved on June 28, 1938, being H. R. 10618, 75th Congress, 3rd Session, (Public No. 761, Chapter 795) 52 Stat. 1215, styled:

“An Act authorizing the construction of certain public works on rivers and harbors for flood control and other purposes,”

and particularly that portion of said Act entitled:

“The Denison Reservoir on Red River in Texas and Oklahoma for flood control and other purposes as described in House Document numbered 541, Seventy-fifth Congress, third session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable, is adopted and authorized at an estimated cost of \$54,000,000: PROVIDED, That in the consideration of benefits in connection with the Denison Reservoir all benefits that can be assigned to the proposed Altus project and other such projects in Oklahoma shall be reserved for said projects.”

The complaint alleges that said last named portion of said Act as same is being applied and is sought to be applied by the appellees is repugnant to the Constitution of the United States and is not within the powers of Congress, expressed or implied, conferred by the Constitution of the United States by Section 8, Article 1, or any other provision thereof, and that said act and threatened acts of said appellees under and pursuant to said Act of Congress constituted an unlawful invasion of the sovereign, quasi sovereign, territorial and proprietary rights of the appellant, State of Oklahoma, reserved to it and protected by the Tenth Amendment to the Constitution of the United States; that said appellees are acting and threatening to act in excess of legal or constitutional authority and unless enjoined and restrained, said appellees will commit and perform said illegal and void acts and invasions to the irreparable injury of appellant, State of Oklahoma, for which appellant has no complete, adequate, nor speedy remedy at law.

III.

On the 8 day of February, 1941, a specially constituted United States District Court for the Eastern District of Oklahoma, composed of three judges designated as provided by said Act of August 24, 1937, entered an order, judgment and decree dismissing the complaint and denying the prayer for injunction, and this appeal is taken from that order, judgment and decree. The specially constituted three judge court aforesaid, after notice to all parties, and after argument and hearing prepared and filed in said cause, on the 25 day of January, 1941, its Memorandum Opinion, wherein it held that the Act of Congress challenged by said complaint as being repugnant to the Constitution of the United States; as same was being applied and sought to be applied by appellees, was not repugnant to the Constitution of the United States and was valid and lawful, and that the acts and threatened acts of appellees were lawful.

There is appended to this statement a copy of said Memorandum Opinion delivered by said Court.

The Petition for Appeal was filed by this appellant with the Clerk of the United States District Court for the Eastern District of Oklahoma on the 8 day of February, 1941.

IV.

The cases which appellant believes sustains the jurisdiction of the Supreme Court of the United States to hear and determine this appeal, are:

William Jameson & Company, Inc. v. Henry Morgenthau, Jr., Secretary of the Treasury, 307 U. S. 171-174, 83 L. Ed. 1189;

International Ladies Garment Workers' Union v. Donnelly Garment Co., 304 U. S. 243-251, 82 L. Ed. 1316;

State Board of Equalization v. Young's Market Co.,
299 U. S. 59, 81 L. Ed. 38;

California Water Service Co. v. Redding, 304 U. S. 252,
82 L. Ed. 1323.

Dated this 8 day of February, 1941.

THE STATE OF OKLAHOMA,
By MAC Q. WILLIAMSON,
Attorney General of the State
of Oklahoma;
RANDELL S. COBB,
First Assistant Attorney Gen-
eral of the State of Oklahoma;
C. C. HATCHETT,
of Durant;
WM. O. COB,
Of Oklahoma City;
Attorneys for Plaintiff.

Filed February 8, 1941.

EXHIBIT "A".

(Caption Omitted).

Before HUXMAN and MURRAH, Circuit Judges, and RICE,
District Judge.

MEMORANDUM OPINION.

By this action the State of Oklahoma, upon the relation of Leon C. Phillips, Governor, challenges the right of the defendants to proceed with the construction of what is commonly known as the Denison Dam. The dam is now in the process of construction across Red River near Denison, Texas, and from a point in Bryan County, Oklahoma. The defendant, Guy F. Atkinson Company, a corporation, is the contractor and it is charged in the bill of complaint that he is purporting to act under a contract with the Secretary of War. The defendant, Cleon A. Summers, is the United States District Attorney for the Eastern District of Oklahoma. Curtis P. Harris, defendant, is a Special Attorney for the Department of Justice of the United States. As to the latter two defendants, it is charged that they have already instituted numerous suits for the condemnation of lands within the proposed area of the dam, and, unless enjoined, will institute other suits for the condemnation of lands within the State of Oklahoma. The plaintiff further alleges that the defendants are proceeding under a certain act of Congress passed and approved on June 28, 1938, being H. R. 10618, public No. 761, 75th Congress, chapter 795, 52 Stat. 1215, styled "An Act authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes", and that this Act of Congress is unconstitutional and void, contravening powers reserved to the plaintiff by the Tenth Amendment; that it is wholly beyond the power of Congress to enact; that the project and scheme as outlined in the Act authorizing its construction and in House Document No. 541 referred to in the Act are not for a public purpose and are not within either the expressed or implied powers of Congress.

Other allegations contained in the plaintiff's bill are that if the dam is constructed as contemplated, it will inundate

approximately one hundred thousand acres of lands within the State of Oklahoma, much of which land is owned by the State of Oklahoma in fee simple; that it will destroy many of the highways of the State of Oklahoma; that it will compel eight thousand residents of the State of Oklahoma to move; that it will seriously affect political subdivisions of the State of Oklahoma, both counties and school districts in that much of the lands situated in such subdivisions will be taken; that much of the lands within the area affected are oil producing lands and that the building of the dam will seriously effect the development of these oil lands and will deprive the State of Oklahoma of much revenue to be derived from the gross production tax on the oil and gas that might be produced; and that the impounding of the waters behind said dam would cover lands in both the State of Texas and the State of Oklahoma and would thereby obliterate the boundary line between the two States; that under the plan it is contemplated that waters from both the Red River and the Washita River, a non-navigable tributary of the Red River wholly within the State of Oklahoma, are to be impounded and thereafter conducted through conduits into the State of Texas and there conducted through turbines for the purpose of generating electrical power; that the plan for the construction of said dam as disclosed in House Document 541 contemplates the construction of a dam for both flood control purposes and for the purpose of the generation of hydroelectric power; that the two purposes are functionally separate and neither is incidental or a necessary result of the other; that the electric power feature is not in aid of nor related to flood-control; that Red River within the State of Oklahoma is a non-navigable stream; that the non-navigability of Red River within the State of Oklahoma was determined by the Supreme Court of the United States in the case of *State of Oklahoma, complainant, v. State of Texas, defendant, United States, Intervener*, 258 U. S. 574, decided May 1, 1922.

The prayer of the plaintiff's bill of complaint is that the contractor, Guy F. Atkinson Company, its agents, servants and employees be permanently restrained and enjoined from constructing the dam in question and that the de-

defendants, Cleon A. Summers and Curtis P. Harris be enjoined and restrained from instituting and conducting in any court within the State of Oklahoma any suit or proceeding for the condemnation of any lands owned by plaintiff or located within its domain for the purpose of obtaining a site or right-of-way for said dam or the reservoir to be created thereby.

The defendants, represented by the Department of Justice of the United States, have filed a motion to dismiss. This motion to dismiss presents, first, the jurisdiction of the court to entertain this suit, and, second, appropriately raises the constitutionality of the Act of Congress involved. The accepted procedure for presenting this constitutional question by motion to dismiss. *Arizona v. California*, 283 U. S. 423; *Steward Machine Company v. Davis*, 301 U. S. 548; *New Jersey v. Sargent*, 269 U. S. 328.

At the threshold we are met with the objection to jurisdiction. Defendants contend that the government is the real party in interest, and, its consent not having been given, it may not be sued, and that the Secretary of War is an indispensable party. The immunity of the government from suit, to which it has not consented, is a principle too well established to require citation of authority. Is this a suit against the government? On the face of the pleadings it is not. The plaintiff is proceeding against the individual defendants on the theory that the Act of Congress under which they are admittedly acting is unconstitutional. Although there may be some slightly apparent conflict in the decisions, we think it is fairly well established that if an agent of the government act without authority or attempts to act under a void or unconstitutional Act of Congress, he ceases to act in an official capacity and a suit against him is not a suit against the government, in such case the theory or fiction, if we would call it such, being that the government can act only under constitutional authority. It follows that the exemption of the government from suit does not exempt or protect its officials from being sued when they are proceeding without authority or under an unconstitutional Act of Congress. Otherwise, there would be no constitutional limitations, since there would be no way of testing the consti-

tutionality of the challenged procedure. *Philadelphia Company v. Henry L. Stimson, Secretary of War*, 223 U. S. 605; *Ickes v. Fox*, 300 U. S. 82; *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381; *Ryan v. C. B. & Q. Railroad*, 59 Fed (2nd) 137; *Franklin Township v. Tugwell, Administrator of Resettlement Administration*, 85 Fed. (2d) 208; *United States v. Lee*, 106 U. S. 196.

If the Act of Congress is unconstitutional, then the Secretary of War is not a necessary party. *Colorado v. Toll*, 268 U. S. 228; *Missouri v. Holland*, 252 U. S. 416; *Ryan v. Amazon Petroleum Corporation*, 71 Fed. (2d) 1. In *Colorado v. Toll*, *supra*, the Court says: "The object of the bill is to restrain an individual from doing acts that is alleged he has no authority to do and that derogate from the quasi-sovereign authority of the State. There is no question that a bill in equity is a proper remedy and that it may be pursued against the defendant without joining his superior officers of the United States". It would seem, therefore, that if the Act is unconstitutional, the authorities sustain the right of the State to maintain the action, the appropriateness of injunctive relief, that it is not a suit against the United States, that the Secretary of War is not a necessary party. And, since the Act of Congress in question is challenged by the plaintiff as unconstitutional, and the constitutionality of the said Act is asserted by the defendants, who are within the jurisdiction of this Court and have been served by proper process, this court has jurisdiction to entertain the suit and must of necessity determine or pass upon the constitutionality of the Act. The question and the manner in which it is presented, rather than the ultimate answer, determine jurisdiction.

The motion to dismiss admits all facts well pleaded. It does not admit conclusions of law or deductions of fact not warranted. Most of the allegations of Plaintiff's complaint are immaterial in so far as the constitutionality of the Act in question is involved. Upon oral argument the attorneys for the plaintiff conceded that if the Act of Congress in question is constitutional, the motion of the defendant to dismiss should be sustained. They further admitted that in the determination of the constitutionality of the Act,

assuming the truth of all well pleaded allegations, no evidence was necessary or proper. They further admitted upon oral argument and in their brief that if the Act is constitutional, the government may acquire any and all lands by condemnation proceedings, even the lands of the State of Oklahoma, needed in the construction of this project. The sole question therefore, before the court upon this motion to dismiss is whether or not the Act is constitutional.

The contention of the plaintiff is that the construction of this dam has no relation to navigation; that the Act of Congress originally provided for a dam for two purposes, to wit: flood control and hydroelectric purposes; and that the inclusion of the hydroelectric feature rendered the entire Act unconstitutional; that it would not be necessary for the court to pass upon whether or not the dam could be built for flood control purposes, since the inclusion of the hydroelectric feature would in all events render the Act unconstitutional for the reason that the government may not impound the waters of a non-navigable portion of a stream even for a lawful purpose and thereafter use the waters impounded for generating electric power.

The Act of Congress of June 28, 1938, under which the defendants are proceeding is entitled "An Act authorizing the construction of certain public works on rivers and harbors for flood control and for other purposes" 52 Stats. 1215. This is a comprehensive Act dealing with flood control projects in many parts of the United States. The declared purpose of the Act, as contained in Section 4, is "that the following works of improvements for the benefit of navigation and control of destructive floods, and other purposes, are hereby adopted and authorized * * *". In the original Act, after a statement of general purpose contained in Section 4, with specific reference to the Denison Dam, the following language is used: "The Denison Reservoir on Red River in Texas and Oklahoma, for flood control and other purposes, as described in House Document No. 541, 75th Congress, 3d Session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable, is adopted and

authorized at an estimated cost of \$54,000,000.00". By an Act approved October 17, 1940, H. R. 9972, Public No. 868, Chapter 895, 76th Congress, 3d Session, in Section 4 thereof Congress declared: "The project for the Denison Reservoir on Red River in Texas and Oklahoma, authorized by the Flood Control Act approved June 28, 1938, is hereby declared to be for the purpose of improving navigation, regulating the flow of Red River, controlling floods, and for other beneficial uses". This last Act of Congress the plaintiff designated as no more than a self-serving declaration by Congress. This Act was passed by Congress with a full knowledge of the changes made in the plans as described in House Document 541, and may be considered as a ratification of the changes and modifications. It further reaffirmed the purpose of Congress in authorizing the construction of the dam. It might be observed that the declared purpose in the Act of October 17, 1940, is in no substantial particular different from that of Section 4 of the Act of June 28, 1938. It is merely a bit more specific. There is no substantial difference between "benefit of navigation" and the more specific statement "purpose of improving navigation, regulating the flow of Red River". In substance they mean the same. It seems further that the purposes as set forth in Section 4 of the Act of 1938 apply to all of the projects contained in the said Act, even though Congress in making the specific reference to the Denison Dam used the language "for flood control and other purposes". Certainly the Act of October 17, 1940, would remove any doubt that might exist by reason of the use of the particular language in the Act of 1938.

The plaintiff in this case in effect asks the court to determine that the purposes of the dam are not those that Congress has said them to be. Much time is given in the brief filed herein to a discussion of the evidence before the Congressional committee and to the report contained in House Document 541. The argument is made that in fact this dam will not be an aid to navigation or commerce. While House Document 541, in a summary of the benefits to navigation, contains the statement that present or prospective commerce on the navigable portion of Red River would not

justify the cost involved in the construction of the dam, it states "The construction of the Denison Reservoir would have a favorable effect on open channel navigation by reducing flood stages and increasing low water flows (page 68)". Again on page 72 it is said "In the event that at some future time prospective commerce should justify a navigation system, it is believed such a system would consist of reservoirs operated in conjunction with a series of locks and dams. If this contingency should materialize the proposed Denison Reservoir, located above the navigable portion of the river, would fit into such a general scheme of improvement". House Document 541 discusses flood control, benefits to interstate commerce, and the damaging effect of floods upon interstate commerce; and, after consideration of all the facts before it, Congress enacted the particular legislation for the purposes set forth in the Act itself. It is not for courts to go behind the expressed purpose of an Act of Congress and say that it was not enacted for that purpose as long as the means provided are not unrelated to the expressed objects of the legislation. *Arizona v. California*, 283 U. S. 423; *Ashwander v. T. V. A.*, 297 U. S. 288.

The power of the United States government over waters is not limited to control of navigation. In the recent case of *United States v. Appalachian Electric Power Company*, decided December 16, 1940, the court uses this language. "In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. By navigation respondent means no more than operation of boats and improvement of the waterway itself. In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole. *Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control.*" (Emphasis ours.) It is true that in the *Appalachian* case, *supra*, the court determined that the river was in fact navigable. It is well settled, however, that in the exercise of its control the government is not limited in its activity to that portion of a

stream which is in fact navigable if the stream in general is a navigable stream, as is the Red River in its lower parts. *United States v. Rio Grande Irrigation Company*, 174 U. S. 690, 703. It is also well settled that the government may construct a dam and power project on the non-navigable portion of a stream for the purposes of controlling floods in the navigable portions of the stream below the dam. *United States v. Appalachian Electric Power Company*, 107 Fed. (2d) 769, 809; *United States v. Rio Grande Irrigation Company*, 174 U. S. 690; *California Oregon Power Company v. Cement Company*, 295 U. S. 142; *United States v. Utah*, 283 U. S. 64; *United States v. Eighty Acres of Land*, 26 F. Supp. 315 (E. D. Ill.); *Appalachian Electric Power Company v. Smith*, 4 F. Supp. 6 (W. D. Va.).

For years Congress has been legislating on the subject of flood control. Flood control is one of the important methods whereby the navigability of a river is benefited and whereby the government may properly function in its regulation of interstate commerce. This principle is definitely recognized in *United States v. Appalachian Electric Power Company*, supra. We think unquestionably that Congress has said this dam is being constructed for the benefit of navigation and for flood control. In so far as the dam is constructed for either or both of these purposes, the defendants are proceeding under a valid Act of Congress. Congress in thus proceeding does so under its power of regulating and controlling interstate commerce. The power to promote interstate commerce is a general power and Congress may do everything that reasonably relates to that express power. It may deepen the channels of navigable streams, it may undertake flood control projects on such streams, it may build and construct highway bridges across navigable and non-navigable streams. Its power to prevent floods interfering with interstate commerce is not limited to navigable streams, and it may do anything that is reasonably necessary to prevent the interruption of interstate commerce upon navigable rivers. Flood control improves navigation and is an effective means of controlling, improving and thereby regulating interstate commerce. Having concluded that this legislation is valid under the power of

Congress to regulate and control interstate commerce, it is not necessary for this court to pass upon whether or not it might be valid under any other clause of the constitution.

The plaintiff makes much of its argument that the generation of electric power is in no way incidental to flood control. While it may be true that the generation of electricity is not incidental to flood control, it manifestly is true that when the government impounds water behind a dam for purposes of flood control, there is a vast amount of stored energy which may reasonably be converted into electrical energy. In this potential electrical energy in water impounded behind a dam built for some constitutional purpose by the United States government, the government has a proprietary interest. In the Appalachian case, *supra*, the court said: "Water power, development from dams in navigable streams is, from the public standpoint, a by-product of the general use of the rivers for commerce."

If the Denison Dam were being constructed upon the navigable portion of Red River, if, if the Red River at the point where the dam is being constructed were navigable in fact, it might be assumed that the plaintiff would not question the right of the government to include within the project the hydroelectric feature. It is well settled that the government may build a power project in connection with regulating the navigability of streams. In the Ashwander case, *supra*, the court said: "The government acquired full title to the dam site, with all riparian rights. The power of falling water was an inevitable incident of the construction of the dam, and that water power came into the exclusive control of the federal government. The mechanical energy was converted into electrical energy and the water power, the right to convert it into electrical energy, and the electricity thus produced constitute property belonging to the United States."

But the Red River at the point where the dam is being constructed has been determined by the Supreme Court of the United States to be non-navigable. Does this fact preclude the government from utilizing the stored energy in the water impounded for the generation of electric power?

We think not. The waters to be impounded are flood waters that would pass on without utilization by the State except for the erection of the dam with funds expended by the government. Having created this energy by the expenditure of its funds, the government has a right to utilize it in liquidating the expense of maintaining the structure and in paying the cost of its construction. Since Congress is not limited to the navigable portion of a stream in building a dam for proper purposes, the inclusion of an electric or power project in connection therewith is not prohibited. No case holds that the power part of the project must be in aid of the other purposes or that the manufacture of electricity must be a mere incident to the other purposes. A proper understanding of the cases leads to the conclusion that as an incident to the construction of a dam for proper purposes the government has the power to connect therewith a project, for making use of the mechanical energy in the stored waters and convert it into electrical energy as a means of liquidating the cost and expense of maintaining the project.

Fundamentally, what plaintiff seeks to have this court declare and determine, is that Congress enacted this legislation for one purpose but declared it to be for another purpose. This would in effect accuse Congress of using a declared purpose as a subterfuge for accomplishing an act not within its power. This court will not assume that Congress determined to invade the sovereign rights of the State of Oklahoma and use its waters for an illegal purpose under the guise of a legal or proper purpose. This court may not inquire into the motives which induced members of Congress to enact the Denison Dam legislation, *Arizona v. California*, supra. Congress in passing this legislation had before it House Document 541, and, after consideration of House Document 541 and other evidence before it, reached the conclusion that the Denison Dam would serve the purpose of navigation and flood control. In reaching this conclusion, we cannot say that Congress acted arbitrarily. Since Congress was functioning in the field of its granted constitutional power, there is and can be no invasion of state sovereignty. *United States v. Appalachian Electric Power Company*, supra.

The motion of the defendants to dismiss is sustained. The Attorneys for the defendants will prepare a decree in proper form. This matter is set for entry of such decree at Muskogee on the 8th day of February, 1941, at 10:00 A. M.

Filed Feb. 8, 1941, W. V. McClure, Clerk, U. S. District Court.

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